Supreme Court, U.S.
FILED
FEB 25 1992
OFFICE OF THE CLERK

No. 91-611

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

KEYTON E. BARKER AND PAULINE BARKER, *ET AL.*,
PETITIONERS,

VS.

STATE OF KANSAS, *ET AL.*,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

REPLY BRIEF ON THE MERITS

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REPLY BRIEF ON THE MERITS

REPLY TO STATEMENT OF THE CASE

It is true that creation of the Kansas Public Employees Retirement System ["KPERS"] in 1961 was also accompanied by income tax exemptions for KPERS benefits and federal civil service retirement benefits. [Respondents' Br. at 4 n.3]. However, the exemption for KPERS benefits was enacted to maximize the value of state retirement income while minimizing the need for higher benefit payments.

> '. . . When the state originally embarked upon its state retirement program an income tax exemption was granted to the participants on the basis that the actual retirement benefits plus the income tax exemption, when taken together, amounted to a

> justifiable composite retirement program. In making this decision the state rejected proposals for higher retirement benefits without exemption from income tax liability.'

Special Comm. on Assessment and Taxation, 2 *Report on Kansas Legislative Interim Studies to the 1978 Legislature* 376 (1977) [quoting message of Governor Bennett].

It is also true that military retirees have sought relief from disparate income taxation in Kansas since at least 1971; but they have been unable to obtain equal tax treatment through the legislative process. [Respondents' Br. at 5 n.3; *see also* R. at 1602-1616, *Barker* (Dist. Ct. Case No. 89-CV-666)]. Moreover, this legislative record and supporting history contains ***no evidence*** that "[t]he Kansas tax treatment at issue is the product of a considered determination premised on appreciable differences between military retirees and all other retirees" stemming from "the unique status of military retirees." [Respondents' Br. at 30].[1]

Finally, mandatory employee contributions to the KPERS system are "picked up" by their employer in accordance with Kan.Stat.Ann. § 74-4919(2)(a) (Supp. 1990). [Respondents' Br. at 6]. These contributions avoid federal income taxation when made since they are "treated as employer contributions" under 26 U.S.C. § 414(h)(2), § 401(a) and § 403(a). Therefore, despite Respondents' erroneous assertion to the contrary [Respondents' Br. at 6], 26 U.S.C. § 72(o) does not exclude from taxable income any mandatory employee contributions under KPERS or other

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[1] Respondents have notably failed to cite any statutory language or legislative history which suggests, directly or indirectly, that military status or burdens associated with military retirement have ever been considered or endorsed by the Kansas Legislature as any basis for disparate tax treatment of military retirees. As Respondents well know, such evidence does not exist.

government plans.[2]

ARGUMENT

Proper application of the modern doctrine of intergovernmental tax immunity in this case -- the heart of which is nondiscriminatory taxation -- requires objective examination of the Kansas income tax structure applicable to all retired government employees and the nature of the classification erected by Kan.Stat.Ann § 79-32,117 (Supp. 1990). However, Respondents' unpersuasive attempt to justify the Kansas tax scheme ignores its structure as a whole, its source-dependent classification, and its operative effect on all federal, state and local government retirees. Instead, Respondents selectively limit the

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[2] In relevant part, 26 U.S.C. § 72(o) provides:

> (1) **Treatment of contributions.** -- For purposes of this section and sections 402 and 403, notwithstanding section 414(h), any deductible employee contribution made to a qualified employer plan or government plan shall be treated as an amount contributed by the employer which is not includible in the gross income of the employee.
>
> * * * *
>
> (5) **Definitions and special rules.** -- for purposes of this subsection —
>
> (A) **Deductible employee contributions.** – The term 'deductible employee contributions' means any qualified voluntary employee contribution (as defined in section 219(e)(2)) made after December 31, 1981, in a taxable year beginning after such date and made for a taxable year beginning before January 1, 1987, and allowable as a deduction under section 219(a) for such taxable year.

Consequently, Section 72(o) is expressly limited to ***voluntary*** employee contributions made to "an individual retirement plan" [26 U.S.C. § 219(e)(2)], between January 1, 1982 and December 31, 1986, which qualifies for an IRA deduction under 26 U.S.C. § 219(1).

inquiry to asserted differences between federal military retirees and all government retirees who receive preferential tax treatment, and impermissibly erect an artificial classification -- unrelated to the actual tax structure at issue -- ostensibly designed to account for those asserted differences. While this result-oriented approach inherently skews the proper inquiry and does not weigh any federal sovereignty interests in the balance, it ultimately fails to identify any "significant" differences between even these retirees which furnish a genuine reason for differential treatment or justification for discrimination.

1. RESPONDENTS CANNOT JUSTIFIABLY LIMIT THE SCOPE OF INQUIRY.

Respondents endeavor to divert attention from the proper inquiry by criticizing Petitioners for showing that the unitary tax structure applicable to all government retirees in Kansas erects a classification which burdens every retired officer and employee of the United States who receives retirement compensation from any federal source other than the civil service retirement and disability fund. [*Cf.* Respondents' Br. at 20-22 *with* Petitioners' Br. at 4 n.4 and 15-29]. In this regard, it is claimed that Petitioners have made a "subtle shift" in position which transcends the pleadings, on behalf of taxpayers who are not before the Court, involving issues "not fairly embraced in the question presented." [Respondents' Br. at 20-22].[3] These distorted views are meritless and must not

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[3] Respondents' contention that the differential treatment of all federal retirees in Kansas should be ignored because the issue does not appear in the pleadings is not entitled to any credence. First, the petitions filed in the district court [J.A. 3-19, 27-32, 37-47] plainly comply with the liberal notice pleading requirements of Kan.Stat.Ann. § 60-208(a) (Supp. 1990). *See Oller v. Kincheloe's, Inc.*, 235 Kan. 440, 446, 681 P.2d 630 (1984) ["We now require only a bare-bones pleading which outlines the nature of the claim."]. There are no requirements to plead a cause of action, legal theories or matters of evidentiary proof to support a claim for relief. *Id.* at 446-449. Second, since this procedural objection was never raised in, nor passed upon by, the Kansas Supreme Court, [*see* Brief of Appellees, *Barker v. Kansas*, No. 90-65848 (Kan.Sup.Ct.); Pet. App. at 28a-29a], it is not before this Court on writ of certiorari. Finally,

be allowed to serve as red herrings.

Since Respondents concede, as they must, that "[t]he court should examine 'the whole tax structure of the state' in considering the validity of the Kansas income tax treatment of military retirees" [Respondents' Br. at 23 (citations omitted)], Petitioners cannot be faulted for doing so. Resolution of the question presented inherently requires a comprehensive examination of the tax structure applicable to all federal, state and local government retirees, *cf. Washington v. United States*, 460 U.S. 536, 542 (1983), and the analysis must "focus on the nature of the classification" created by Kan.Stat.Ann. § 79-32,117(c). *See Phillips Chemical Co. v. Dumas Independent School Dist.*, 361 U.S. 376, 383 (1960).[4] Petitioners have litigated these matters at length in the District Court of Shawnee County, the Kansas Supreme Court and this Court. [*See* R. at 505-577, *Barker* (Dist. Ct. Case No. 89-CV-666); Brief of Appellants at 10-14, 22-32, *Barker v. Kansas*, No. 90-65848 (Kan.Sup.Ct.); Reply Brief at 5-6, *Barker v. Kansas*, No. 90-65848 (Kan.Sup.Ct.); Pet. at 12-23, 28; Petitioners' Br. at 13-27, 29-30]. Nevertheless, Respondents persistently refuse to squarely address the differential taxation of all federal retirees who are burdened by the same source-dependent classification as retired members of the Armed Forces. [*See* Brief of Appellees at 22-23, *Barker v. Kansas*, No. 90-65858 (Kan.Sup.Ct.); Respondents' Br. in Opp. at 12-13; Respondents'

Respondents' procedural objection is predicated entirely upon the application of state law [i.e., Kan.Stat.Ann. § 60-208(a)] and, therefore, does not present a substantial federal question or otherwise affect the dispositive question on writ of certiorari.

[4] Since this method of inquiry is central to any objective evaluation of state tax statutes under the immunity doctrine [*see* Petitioners' Br. at 11-12, 16-20], the characteristics and treatment of all federal military and civilian retirees subject to Kansas income taxation is fairly embraced within the question presented. *See, e.g., Vance v. Terrazas*, 444 U.S. 252, 258-259 n.5 (1980); *Cuyler v. Sullivan*, 446 U.S. 335, 342-343 (1980); *Procunier v. Navarette*, 434 U.S. 555, 559-560 n.6 (1978).

Br. at 22-23].[5]

While the only parties before this Court are retired members of the Armed Forces [and their spouses, where

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[5] *Amici* National Conference of State Legislatures, et al. ["NCSL"], mistakenly argue that the disparate treatment of all federal retirees "was never litigated" and this matter should not be considered since "[o]ther federal retirement systems may or may not set up classes that significantly differ from the class of state and local government retirees." [*Amici* NCSL Br. at 13]. *Amici* is wrong on both counts. First, as previously demonstrated, this issue has been the subject of extensive briefing and all federal retirement systems have been brought to the attention of the courts below. Respondents have ignored the differential treatment of all federal retirees taxed by Kansas because it vividly demonstrates that discrimination is not based on any uniform differences between members of the favored and disfavored classes.

Second, the Court in *Phillips* properly focused on the nature of the classification established by Texas statute to determine whether state tax discrimination against federal lessees was "based on" and "justified by significant differences" between "*all* lessees of federal property" and all lessees of property owned by Texas and its political subdivisions. 361 U.S. at 383-385 [emphasis in original]. Although federal leasehold interests were expressly "subject to State or local taxation" at the time, 361 U.S. at 381 n.7, *Phillips* struck down the discriminatory tax statute because "the Texas classification" was unjustified. *Id.* at 387. Since the dispositive question in this case likewise involves the validity of a state tax statute, the focus must be on the nature of the Kansas classification which results in differential tax treatment of all government retirees within its reach.

In view of the fact that Kan.Stat.Ann. § 79-32,117(a) incorporates federal adjusted gross income as state law -- but not provisions of "[o]ther federal retirement systems," the Internal Revenue Code should be examined to determine whether Congress recognizes any "significant differences" between government retirees as the basis for tax discrimination. While Respondents also refuse to engage in this inquiry, all retired federal, state and local government employees who receive nondisability retirement income are subject to substantially the same tax burdens and benefits under federal law. [*See* Petitioners' Br. at 27-29, 35-36]. Indeed, it remains undisputed that for purposes of income taxation, *"members (or former members) of the Uniformed Services should be treated essentially the same as retirees under the civil service program and other qualified pension or annuity plans."* H.R. Rep. No. 1118, 89th Cong., 1st Sess. 4-5 (1965) [emphasis added].

applicable], this does not mean that the characteristics and treatment of other federal retirees are immaterial. The differential exemption scheme codified in Kan.Stat.Ann. § 79-32,117(c) creates two classes of government retirees identified strictly by source of retirement compensation: a favored class, the members of which receive benefits that are not taxed because the source of their compensation is specified as the basis for an exemption; and a disfavored class, the members of which receive benefits that are taxed because the source of their compensation is not specified as the basis for an exemption. In operation, this source-dependent classification scheme favors all state and local government retirees over all federal retirees (military and civilian) who receive nondisability benefits from any federal source except the civil service retirement and disability fund. Therefore, the Kansas tax structure itself defines the two classes which must be examined to determine whether differential taxation is based on and justified by significant differences between them. *See Phillips*, 361 U.S. at 380-385; *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 815-816 (1989).[6]

To be sure, no federal civilian retirees have asserted a claim for relief in this litigation. In this sense, their legal interests are not directly at issue. However, it is inconceivable that one can properly examine the "whole tax structure" of Kansas and "focus on the nature of the classification" without considering the characteristics and treatment of federal civilian retirees taxed under

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[6] Respondents' position that Petitioners' approach "might merit consideration if the class they represent included these other federal retirees" [Respondents' Br. at 22] erroneously suggests that the proper scope of inquiry is somehow dependent upon form over substance rather than the classification at issue. While Petitioners do not purport to champion or assert the legal interests of these other federal retirees, their consideration is appropriate because they have been placed in the same statutory class under Kan.Stat.Ann. § 79-32,117(a) and they are treated less favorably than state and local government retirees because of the differential exemption scheme created by Kan.Stat.Ann. § 79-32,117(c). Petitioners' certified class in this case, therefore, must not be confused with the class of favored retirees and disfavored retirees defined by the Kansas tax scheme, which must be the focus of any objective inquiry.

the same taxing provision as retired members of the Armed Forces.[7] If the characteristics of all similarly situated federal retirees in a disfavored class can be selectively ignored, it becomes considerably more difficult to accurately evaluate whether a state's proffered justification is the genuine reason for discrimination (if otherwise permissible) or an expedient afterthought crafted by taxing officials to mask unlawful state action.[8] Since the modern doctrine of intergovernmental tax immunity requires elevated scrutiny to account for the federal interests at stake, *Davis*, 489 U.S. 816, differential taxation cannot be upheld simply because "any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). Therefore, the characteristics and treatment of other federal retirees who are taxed by Kansas must be considered, ***as evidence*** in evaluating the nature of the statutory classification at issue *and* determining whether the classification is directly related to any significant differences between the favored and disfavored class of government retirees.

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[7] Respondents contend that the treatment of these federal retirees should not be "grouped together" with military retirees or otherwise considered "[b]ecause military retirees are unique and thus unlike other 'disfavored government retirees.'" [Respondents' Br. at 22]. However, all federal military and civilian retirees taxed under Kan.Stat.Ann. § 79-32,117(a) are already "grouped together" by statute; they share relevant characteristics for purposes of retirement and taxation [Petitioners' Br. at 13-14, 23, 36-39]; they receive substantially the same treatment under relevant provisions of the Internal Revenue Code which have been incorporated as Kansas law [Petitioners' Br. at 27-29, 35-36]; and they are adversely affected by the differential classification codified in Kan.Stat.Ann. § 79-32,117(c). Regardless of one's views on the ultimate standard of justification, these federal civilian retirees are "similarly situated" with military retirees under the Kansas tax scheme and they may not be excluded from consideration. *Cf. Phillips*, 361 U.S. at 381, 383.

[8] Although the property at issue in *Phillips* was an "ordnance works" leased from the United States and no other federal lessees were parties to the action, this Court utilized lessees of "[w]arehouse facilities" to demonstrate the absence of any direct relationship between the Texas classification and the asserted basis for tax discrimination. 361 U.S. at 384-385.

II. THE KANSAS TAX STRUCTURE DOES NOT RECOGNIZE ANY "SIGNIFICANT DIFFERENCES" BETWEEN GOVERNMENT RETIREES THAT DIRECTLY RELATE TO OR JUSTIFY INCONSISTENT TAX TREATMENT.

A. No Asserted Differences Between Government Retirees Who Receive Nondisability Benefits Are Significant For Purposes of Taxation.

Respondents contend that because military retirees face continuing burdens in retirement under federal law and receive retirement income which is current compensation for reduced service, they are "significantly different" from all other retirees. [Respondents' Br. at 11-18]. If the nondiscrimination clause of 4 U.S.C. § 111 is to have any meaning, however, military and civilian retirement systems may not be selectively compared to achieve a particular result, as Respondents and their *amici* have done. Instead, these retirement systems must be compared as a whole to determine whether any asserted differences have significance in light of the purpose for taxation or exemption and the doctrine of intergovernmental tax immunity. *Cf. Kuhn v. State of Colorado*, 817 P.2d 101, 108 (Colo. 1991) (*en banc*) [when taken as a whole, the military retirement system is akin to civilian retirement systems], *pet. for cert. pending* (U.S.) (No. 91-980).[9] Viewed in this manner, there are no significant differences between federal government retirees who are taxed in Kansas and the government retirees who are not which can be seized upon to justify discrimination here.

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[9] This need is particularly acute where, as here, the State has previously elected to treat military retired pay as pension income: to reduce its own employment costs by prohibiting military retirees from purchasing prior service credit under KPERS, *see* Kan.Stat.Ann. § 74-4919h(1) (Supp. 1990); to increase its tax base by prohibiting military retirees from taking an IRA deduction based on contributions made with military retired pay, Pet. App. at 24a-25a; and to provide for ex-spouses who reside in Kansas upon divorce by treating military retired pay as marital property, Kan.Stat.Ann. § 23-201(b) (1988).

In relevant part, the state and military retirement systems are designed to allow participants to "**retire from active service without prejudice**" and to promote "economy and efficiency in the administration of government affairs." *Cf.* Kan.Stat.Ann. § 74-4901 and § 74-4951 (1985) [emphasis added] *with McCarty v. McCarty*, 453 U.S. 210 (1981).[10] Like KPERS and the federal civil service retirement system, the retirement system for members of the Uniformed Services (which includes the Armed Forces) is a "government plan" under the Internal Revenue Code. *See, e.g.*, Rep. No. 938, 94th Cong., 1st Sess. 450 (1976), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 3439 at 3877; H. Conf. Rep. No. 1515, 94th Cong., 2d Sess. 408 (1976), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 4212. Members of the Armed Forces may retire only after satisfying the statutory requirements for eligibility, which generally require at least 20 years of qualifying active service. *Mansell v. Mansell*, 490 U.S. 581, 583 (1989).[11] Upon retirement, military retirees leave active government service and lose all entitlement to active service pay and allowances. *See* 37 U.S.C. § 204(a), § 402(a), § 403(a) (1988). Retired members of the Armed Forces are "*retired*" and they are entitled to receive "retired pay" under applicable provisions of Title 10 and 14 of the United States Code. *See,*

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10 In *McCarty*, this Court recognized that the major goals of the "military retirement system" are "to provide for the retired service member, and to meet the personnel management needs of the active military forces." 453 U.S. at 232-233.

11 Federal civilian employees must likewise comply with statutory requirements to qualify for retirement and retirement benefits. *See Zucker v. United States*, 758 F.2d 637, 640 (Fed.Cir.) [entitlement to federal civil service retirement benefits are a matter of "legal status" which "must be determined by reference to the statute and regulations governing these benefits, rather than to ordinary contract principles." (*citing United States v. Larionoff*, 431 U.S. 864, 869 (1977)], *cert. denied*, 474 U.S. 842 (1985).

e.g., *McCarty v. McCarty*, 453 U.S. at 214.[12] Like other forms of federal and state retirement income, military retired pay is calculated based on years of qualifying past service and rank. *See McCarty*, 453 U.S. at 214.

In view of these shared attributes which make the military and civilian retirement systems comparable for present purposes, it is significant, yet undenied, that military retirees who receive nondisability retired pay are treated in substantially the same manner under relevant provisions of federal tax law as all other federal, state and local government retirees who receive nondisability retirement compensation. [Petitioners' Br. at 27-29, 35-36]. This equality of treatment under applicable federal laws of income, employment, estate and gift taxation reflects a considered determination by Congress that **"there is no substantial grounds for distinguishing the tax treatment of the [retirement] plan for the uniformed services from these other [qualified pension or annuity] plans."** *Cf.* H.R. Rep. No. 1118, 89th Cong. 1st Sess. 4 (1965) [emphasis added]. Since Congress,

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12 In the recent case of *Sizemore v. Rinehart*, ___ So.2d ___ (Ala. Civ. App., Feb. 7, 1992) (No. CV-89-704-M), the Alabama Court of Appeals persuasively concluded:

> **Those statutes which set up the scheme for retirement of persons in the military services all indicate that those persons are 'retired' in the same sense as non-military retirees.** *See* 10 U.S.C.A. § 3911 (West 1959 and Supp. 1991); 10 U.S.C.A. § 684(b) (West 1983); 10 U.S.C.A. § 688 (West 1983); 10 U.S.C.A. § 1447-1455 (West 1983). **We cannot accept the commissioner's argument that because military personnel are subject to recall at any time, they are not 'retired' just like a state government retiree.** Consequently, the trial court was correct in holding that the Alabama taxation scheme which favored retired state employees over retired military employees violated the doctrine of intergovernmental tax immunity and 4 U.S.C.A. § 111 (West 1985).

Slip op. at 9 [emphasis added].

itself, has plainly concluded that there are no "significant" differences between military and other government retirees for purposes of taxation, it is not within the legitimate prerogative of any State to override that determination in an effort to justify discriminatory taxation.

B. Differential Treatment Is Not "Directly Related" To Any Asserted Difference Between Federal, State and Local Government Retirees.

Respondents contend that the first prong of *Davis* and *Phillips* is satisfied in this case because "an evenhanded application of the rationale for taxing military retirees does not result in the taxation of any state and local government retirees." [Respondents' Br. at 20]. This view is predicated on an erroneous reading of *Davis* and *Phillips* which must be rejected, and it emasculates any protection for federal interests under 4 U.S.C. § 111 by permitting statutory classifications which are both underinclusive and overinclusive.[13]

The first prong of the *Davis* and *Phillips* test plainly requires that differential taxation must be "based on" and "truly intended to account for" asserted differences between the two classes of affected taxpayers. *See Phillips*, 361 U.S. at 384; *Davis*, 489 U.S. at 817. Because the proffered justification must furnish the actual reason for discrimination -- in order to protect the federal interests which weigh in the balance -- the classification drawn by statute may not be overinclusive or underinclusive. *See*

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13 While other federal retirees are equally affected by the same statutory classification, Respondents have improperly and artificially singled out military retirees for comparison in an attempt to sustain disparate treatment. This selective approach is necessary because Respondents recognize that its proferred rationale for discrimination is not applicable to all members of the disfavored class of federal retirees who are taxed in Kansas. The fact that Respondents have not offered any rationale for taxing these federal civilian employees is telling.

Davis, 489 U.S. at 816-817; *Phillips*, 361 U.S. at 383-385.[14] *See also Amici* NCSL Br. at 8-9 n.2 [quoting *Billings v. Illinois*, 188 U.S. 97, 104 (1903)]. The fact that Kan.Stat.Ann. § 74,32,117(c) utilizes source of compensation to exempt federal retirees who are subject to certain post-retirement restrictions and recall to active service, ***and*** to tax federal retirees who are not, clearly demonstrates that Respondents' proffered justification for differential treatment is not the genuine basis for discrimination.

III. REVERSAL OF THE JUDGMENT BELOW DOES NOT REQUIRE ANY EXPANSION OF THE TAX IMMUNITY DOCTRINE.

Despite erroneous assertions to the contrary [*see, i.e.*, Respondents' Br. at 33-50], Petitioners do not seek to expand the constitutional or statutory doctrine of intergovernmental tax immunity or encroach upon state sovereignty interests. Simple application of the modern doctrine currently in existence -- the heart of which is the principle of "nondiscrimination" against the United States or those with whom it deals -- merits reversal of the judgment below. "[I]t still remains true, as it has from the time of *M'Culloch v. Maryland*, 4 Wheat 316 [1819], that a state may not discriminate against the Government or those with whom it deals." *Phillips* , 361 U.S. at 387. *See also Davis*, 489 U.S. at 812-814; *cf. South Carolina v. Baker*, 485 U.S. 505, 526 n.15 (1988) ["The nondiscrimination principle at the heart of the modern intergovernmental tax immunity case law . . . recognizes that the best safeguard against excessive taxation (and the most judicially manageable) is the requirement that the government tax in a nondiscriminatory fashion."].

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14 While the mode of "rational basis" analysis developed in Fourteenth Amendment cases is not controlling here, *Davis*, 489 U.S. at 816, it has been persuasively stated that a **"classification's underinclusiveness or overinclusiveness clearly demonstrates that its actual basis is something other than that asserted by the State."** *Dandridge v. Williams*, 397 U.S. 471, 508 (1970) (Marshall, J., dissenting, joined by Brennan, J.) [emphasis added].

Likewise, proper application of the modern doctrine does not turn upon whether state taxes "interfere with the Federal Government's ability to perform its governmental functions." *Davis*, 489 U.S. at 814; *Phillips*, 361 U.S. at 383-385. Instead, the appropriate test is whether the tax discriminates against the United States or those with whom it deals. *Id.*; *see also South Carolina v. Baker*, 485 U.S. at 523 ["under current intergovernmental tax immunity doctrine the States . . . can tax private parties, even though the financial burden falls on the United States, as long as the tax does not discriminate against the United States or those with whom it deals."]. For more than 50 years, congressional consent under 4 U.S.C. § 111 has been "expressly confined" to state and local "taxation which does not discriminate against [federal] officers or employees because of the source of their compensation." S.Rep. 112, 76th Cong., 1st Sess. 12 (1939); H.R. Rep. 26, 76th Cong., 1st Sess. 5 (1939). *Cf. Memphis Bank & Trust Co. v. Gardner*, 459 U.S. 392, 397-399 (1983) [after observing that the nondiscrimination clause of 31 U.S.C. § 742 is treated as "principally a restatement of the constitutional rule" of intergovernmental tax immunity, the Court invalidated a Tennessee bank tax which discriminated "against federal obligations * * * * by including in the tax base income from federal obligations while excluding income from otherwise comparable state and local obligations."].

In reality, Respondents seek to rip the very heart from the modern tax immunity doctrine by arguing that differential taxation is permissible as long as "those who deal with the Federal Government receive the same state tax treatment as their counterparts in the private sector." [Respondents' Br. at 47]. This self-serving proposition was rejected by the Court in *Davis*, 489 U.S. 814-815 and n.4, and Respondents have offered no justification for requiring any less than that "the State treat those who deal with the Government as well as it treats those with whom it deals itself." *Phillips*, 361 U.S. at 381-382, 385. *See also Davis*, 489 U.S. 815 n.4; *cf. Washington v. United States*, 460 U.S. at 544-545.

Although Respondents assert that the State political process provides a check against discriminatory taxation of federal retirees, this contention was expressly rejected by the eight-member majority in *Davis*, 489 U.S. at 815 n.4. Moreover, this alleged safeguard is illusory in practice once a group of taxpayers have been singled out for differential treatment. *Cf. South Carolina v. Baker*, 485 U.S. at 526 n.15; *Minneapolis Star v. Minnesota Comm'r of Rev.*, 460 U.S. 575, 585 (1983) [when the state selects a taxpayer or group of taxpayers for differential taxation, "the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute."]. The discriminating exemption of state and local retirement benefits -- the purpose of which is to reduce the level of taxation otherwise necessary to furnish the same level of benefits -- cannot provide any realistic protection for federal interests. *See Davis*, 489 U.S. at 815 n.4. Since federal military retirees represent a distinct minority of the voting population in Kansas, it is not surprising that their efforts to secure equal tax treatment from the Kansas legislature have failed for more than 20 years.[15]

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15 While it is also true that federal civil service retirees comprise only a small percentage of Kansas voters, the State has a unique interest in exempting these benefits from tax since KPERS recognizes that some of its own employees (e.g., national guard technicians) are "contributing member[s] of the United States civil service retirement system." Kan.Stat.Ann. § 74-4902(14)(B) (1985). Despite Respondents' unsupported assertions to the contrary [Respondents' Br. at 24], however, federal or state employees who are contributing members of the United States civil service retirement system must pay federal and state income tax on employee contributions when they are made. *See Hogan v. United States*, 513 F.2d 170, 174 (6th Cir. 1975); *Shimota v. United States*, 21 Cl.Ct. 510, 514 (1990), *aff'd*, 943 F.2d 1312 (Fed.Cir. 1991).

CONCLUSION

For the reasons set forth in the Brief for Petitioners, the Brief for the United States as Amicus Curiae in Support of Petitioners, the Brief Amicus Curiae on Behalf of The Retired Officers Association in Support of Petitioners, and this Reply, the judgment of the Kansas Supreme Court should be reversed and this case should be remanded for further proceedings to address the remedial issues which remain.

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